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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 834

JOHN G. GILES and JAMES V. GILES, *Appellants*,

v.

STATE OF MARYLAND

Appeal from the Court of Appeals of Maryland

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Court of Appeals of Maryland affirming the convictions of appellants is reported at 229 Md. 370, 183 A. 2d 359. A copy of the opinion, which contains the judgment, is attached hereto as Appendix A.

JURISDICTION

This is an appeal from a judgment of the Court of Appeals of Maryland affirming the appellants' convictions for rape under Md. Code, Art. 27, Sec. 461.

The opinion and judgment of the Court of Appeals of Maryland was entered on July 18, 1962. A timely motion for reargument was denied on September 19, 1962. Notice of appeal to this Court was filed in the Court of Appeals of Maryland on December 18, 1962.

Jurisdiction is conferred on this Court by 28 U.S.C. § 1257(2).

Cases believed to sustain the jurisdiction of this Court are *Railway Express Agency* v. *Virginia*, 282 U.S. 440 (1931); *Adamson* v. *California*, 332 U.S. 46 (1947); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961); *Largent* v. *Texas*, 318 U.S. 418 (1943); *Prudential Insurance Co.* v. *Cheek*, 259 U.S. 530 (1922); *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Nickey* v. *Mississippi*, 292 U.S. 393 (1934).

STATUTE INVOLVED

The Constitution of Maryland, Article 15, Section 5, provides:

> In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass on the sufficiency of the evidence to sustain a conviction. Ann. Code of Md., Constitution of Maryland, Art. 15, Sec. 5.

QUESTIONS PRESENTED

1. Whether the trial of the appellants, for a capital offense, under the provision of the Constitution of Maryland that the jury are the judges of the law, de-

nied to the appellants due process and equal protection of the law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. Whether, in the appellants' trial for a capital offense, where no request for instructions was made by court-appointed counsel, the failure of the trial judge to give any instructions whatsoever to the jury on the applicable law rendered the appellants' trial violative of the due process and equal protection clauses of the Fourteenth Amendment.

3. Whether a state trial in a capital case is violative of the due process and equal protection clauses of the Fourteenth Amendment when the jury has the right to determine the applicable legal principles as well as the facts of the case, and when the jury is given no instructions whatsoever by the trial court concerning the applicable law.

STATEMENT OF THE CASE

The appellants were convicted of rape, in violation of Maryland Code, Article 27, Section 461, by the Circuit Court for Montgomery County, Maryland, on December 5, 1961 (R. 101).* On December 11, 1961, they were sentenced to suffer death by the administration of a lethal gas (R. 6). The judgments of the trial court may be found in Appendix B hereof.

On the voir dire of the jurors, the trial court asked whether the jurors had any prejudice against Negroes which would prevent them from giving a Negro a fair trial, but refused to ask, as requested by the defense,

* All references in this form are to pages of the record on appeal certified by the Clerk of the Court of Appeals of Maryland, and filed herewith.

whether they had any prejudice against a Negro which would operate when the prosecutrix (in this rape case) was a white woman (R. 7).[1]

The prosecution's case. The case against the appellants was principally based on the testimony of the prosecutrix and of the male companion, one Foster, who was with her on the night of the alleged offense, July 20, 1961. According to the prosecution,[2] the prosecutrix, aged 16 (R. 22), and Foster, aged twenty-one (R. 15), together with two other boys, about twenty years old (R. 15), drove to a country road in Montgomery County, Maryland, to go swimming (R. 15). Their car ran out of gas and the two twenty-year-olds went off to get gas (R. 15).

The prosecutrix and Foster stayed in the car (R. 10). The appellants, aged twenty (R. 69) and twenty-two (R. 52), and two other boys came up the road and passed the car (R. 10-11). The appellants and one of the other boys returned to the car and asked for cigarettes and money (R. 11). When these requests were refused, the three walked away, then returned and "said they wanted the girl" (R. 11). When Foster refused, they broke a window and attacked him (R. 12). Before that attack, the prosecutrix had jumped out of her side of the car and run about thirty feet into the woods, then tripped and lay still until appellant John Giles found her (R. 25). He leaned over her

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[1] The appellants are Negroes (R. 23), while the prosecutrix is white (R. 44).

[2] Certain discrepancies between the stories told by the two principal prosecution witnesses are not material here, so they are ignored in this narrative.

and she heard the other two boys looking around in the woods (R. 26). John Giles said he wanted to call the other two, but, upon request by the prosecutrix, did not (R. 26). She told him that if he would help her get away she would "let him have a little" (R. 34), and they got up and started to move, at which point the other two boys came over (R. 26). They leaned over and kissed her, and one reached for her zipper (R. 26). She said "No" and, when told "Either you do it or we will do it," she said "I will," and took off her shorts and underpants (R. 27). She had intercourse with the three boys, which continued until a police car came down the road and the three boys went down a path in the woods (R. 27-28).

The prosecutrix told the police, and testified at a preliminary hearing, that John had not had intercourse with her, but testified at the trial that she had not been telling the truth on those previous occasions (R. 32-33).

The prosecution witness Cunningham, who saw the prosecutrix come out of the woods, testified that she appeared "cool, calm and collected" (R. 21), and the doctor who examined her that night found spermatozoa cells in the vaginal canal, but mentioned no abrasions or damage to the female organs (R. 18). The prosecution presented no evidence of threats made to, nor violence used on, the prosecutrix.

The prosecution also presented testimony, by a Montgomery County police officer, of oral statements made to him by the appellants on the days of their respective arrests, concerning the events of the night of July 20 (R. 43-48). The statements attributed to the appellants were in substantial accord with the testimony of the appellants, outlined below, with the exception of a mention, attributed to appellant James Giles, of a

remark by one of the three boys that they should drag Foster out of the car and get the girl (R. 44), and with the further exception that in the statement attributed to him by the officer, James Giles said that his brother had had intercourse with the prosecutrix (R. 45).

The defense. The defense on the part of John Giles was a denial that he had intercourse with the prosecutrix. The defense of James Giles was consent.

Both appellants testified that they had been fishing with two companions on the night of July 20 (R. 52-53, 70), and that as they left the fishing hole they passed the car in which the prosecutrix and Foster were sitting (R. 53, 71). One of the companions, whose name was Johnson,[3] asked the escort for a cigarette (R. 53), and Foster replied with an obscene racial epithet (R. 54, 71). An argument ensued, the car window was broken, and the prosecutrix ran out of the far side of the car and Foster out of the near side. Foster was hit by Johnson and fell to the ground (R. 54, 71-73). John Giles went into the woods, and the prosecutrix called him over. She spoke to John, told him that she was on a year's probation and didn't want to get in trouble, and asked if he would help her get away. He said he would, and they started to move. They heard the other two boys approaching, and the prosecutrix called them over (R. 54-55, 73). She told John he could be first to have intercourse with her, but he declined (R. 55-56, 73-74). She took her clothes off, and James Giles and Johnson had intercourse with her (R. 73-74).

Other proceedings. Defense motions for directed verdicts on behalf of both defendants were made at the

[3] The other companion had driven away (R. 8, 11, 24).

close of the prosecution's case (R. 49) and at the close of the evidence (R. 100). Closing arguments for both sides were not taken down by the reporter (R. 101). There appears to have been argument about the law (R. 101). Neither side requested that the trial court instruct the jury, and no instructions were given (R. 101). After the closing argument, the trial court made the following statement to the jury:

> Now, ladies and gentlemen of the jury, the form of your verdict in this case will simply be "Guilty on the First Count" or "Guilty on the First Count without capital punishment" or "Not Guilty", as you shall find from the law and the evidence. You will make a finding as to each defendant under that instruction. Since lunch hour has arrived we have ordered your lunch and it will be available when you retire to your jury room. Swear the Bailiff. (R. 101)

Under Article 15, Section 5 of the Maryland Constitution, *supra*, p. 2, the jury were the judges of the law as well as of the facts.

The conviction and sentence. The jury returned a verdict of "Guilty on the First Count" (of rape), as to both appellants (R. 101). The appellants were sentenced to death (R. 102-103; Appendix B).

The appeal to the Court of Appeals of Maryland, and the presentation of the federal questions. The appellants appealed to the Court of Appeals of Maryland. Among the questions presented to that court were the constitutionality, under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, of the provision of the Maryland Constitution whereby the jury were judges of the law, and the constitutionality, under the same clauses, of the failure of the trial court,

despite the absence of request for instructions and of objection to failure to instruct, to give any instructions whatsoever to the jury. See R. 118-127; Appendix A, pp. 9a-15a.

The Court of Appeals affirmed the convictions, in an opinion filed July 18, 1962 (R. 102-127; Appendix A). In its opinion, the Court of Appeals discussed and upheld the validity, under the United States Constitution, of Article 15, Section 5, of the Maryland Constitution (R. 118-124; Appendix A, pp. 9a-13a). The Court of Appeals also held that the appellants' Constitutional rights were not violated by the failure of the judge to give instructions in the absence of a request (R. 125-127; Appendix A, pp. 14a-15a).

The appellants' motion for reargument was denied on September 19, 1962 (R. 152).[4] Their notice of appeal to this Court was filed in the Court of Appeals of Maryland on December 18, 1962 (R. 150-151).[5]

[4] The appellants' motion to stay issuance of the mandate of the Court of Appeals pending the action of this Court on this appeal was granted on the same date (R. 149). The appellants are confined in death row of the Maryland State Penitentiary, at Baltimore.

[5] On November 15, 1962, the appellants filed in the trial court a motion for a new trial based on newly discovered evidence. The motion was accompained by an affidavit of a girl who was in Foster's home on the day following the incident out of which the appellants' convictions arise. The girl heard Foster's narrative of the incident at that time. Her affidavit sets forth the substance of his narrative, and shows it to have been materially contradictory to his testimony at the trial, and in substantial accord with the testimony of the appellants. The motion was denied by the trial court on November 20, 1962, on the ground that it was not filed within three days after the verdict, as a motion for a new trial is required to be by Maryland Rule 567. An order for appeal to the Court of Appeals from the denial of the motion was filed on December 19, 1962, and the appeal is now pending in the Court of Appeals. The appellants' brief is due on February 25, 1963.

THE QUESTIONS ARE SUBSTANTIAL

I. THE TRIAL OF THE APPELLANTS, UNDER THE PROVISION OF THE CONSTITUTION OF MARYLAND THAT THE JURY ARE THE JUDGES OF THE LAW, WAS SO UNFAIR THAT IT DENIED TO THE APPELLANTS DUE PROCESS AND EQUAL PROTECTION OF THE LAW, AS GUARANTEED BY THE FOURTEENTH AMENDMENT.

This Court has never decided whether it is a violation of due process or equal protection for a person to be convicted by a jury which have the right to judge the law as well as the facts. Although provisions permitting the jury to exercise this function are now in effect in only two states, Maryland and Indiana[6], the impact of the system on all criminal defendants in both states is great. Its impact in this case is great, for the appellants were sentenced to die following their conviction at a trial where the system was applied.

The "jury as judge" system was decisively rejected for the Federal courts by this Court in 1895 in *Sparf and Hansen* v. *United States*, 156 U.S. 51, and the system has either been eliminated or never existed in the remaining 48 states. See *infra*, pp. 13-16.

The operation of the system raises serious questions of due process and equal protection. It is fundamentally unfair. It denies the right of the accused to be tried by the fixed law of the land, it fosters uncertainty in the law, it places the function of legal interpretation in the hands of persons who are unquali-

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[6] Indiana Constitution, Art. 1, Sec. 19. The attitude of the Indiana Supreme Court to the rule is enlightening. In *Beavers* v. *State*, 236 Ind. 549, 141 N.E. 2d 118 (1957), the court had this to say: "Indiana and Maryland are today the sole survivors of this archaic constitutional provision that a jury may determine the law in criminal cases." 236 Ind., at 556, 141 N.E. 2d, at 121. "We have no intentions of extending or perverting this anachronistic doctrine to a still greater degree in this state." 236 Ind., at 564, 141 N.E. 2d, at 125.

fied for such a function, it fails to provide an accused with due notice of the crimes with which he is charged and of which he may be convicted, or even with due notice, after conviction, of the crime for which he stands convicted, and it results in differing enforcement of the laws, depending on the differing legal views of various juries. It has seriously prejudicial effects on appeal rights. Indeed, in the words of Lord Mansfield:

> If juries were to find according to the different impressions the different points of law have upon them, there might be no law at all upon the subject. *Miller's case*, 20 Howell's State Trials 870, 895 (1770).

The fundamental unfairness, uncertainty and inequality produced by the Maryland jury system, as outlined above, presents substantial questions of due process and equal protection for decision by this Court.[7] The decision below, in favor of the validity of the Maryland constitutional provision, is contrary to the great weight of authority on this issue, and should be reviewed by this Court.[8]

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[7] Although the Fourteenth Amendment may not require state jury trials in criminal cases, such jury trials as states do provide must be fair. *Irvin* v. *Dowd*, 366 U.S. 717 (1961).

[8] Briefly, the history of the system in Maryland is as follows. First reference to the jury's right is found in *Baker* v. *State*, 2 H. & J. 5, 7 (1806), where the Court of Appeals declined to decide whether the trial court was correct in refusing to permit counsel to argue to the jury contrary to its instruction, given at his request. In *State* v. *Buchanan*, 5 H. & J. 317, 330 (1821), the court stated that the jury had the right to judge both law and fact, although they should respect the opinion of the court. The rule was included in the Maryland Constitution of 1851, Art. 10, Sec. 5, and remained in the Constitutions of 1864, Art. 12, Sec. 4, and 1867 (the present constitution). See also page 16, *infra*.

A. The Great Weight of Authority Indicates That the Maryland "Jury as Judge" System Is Unconstitutional

1. In *Sparf and Hansen* v. *United States*, *supra*, this Court, in an extensive and thorough opinion by Mr. Justice Harlan, reviewed the history and background of the idea that juries in criminal cases were judges of the law as well as of the facts, and decisively rejected it as the rule in the Federal courts. Both the Federal, 156 U.S., at 64-79, and state, *ibid.*, at 79-86, decisions, as well as the text writers, *ibid.*, at 86-89, were discussed at length, and found to disapprove overwhelmingly, often on constitutional grounds, of the "jury as judge" rule.

The Court also concluded that the law in England at the time of the independence of this country was that the jury were to receive the law from the court. *Ibid.*, at 90.[9]

Although in *Sparf* the issue was the correct rule for the Federal courts, this Court decided the case on the basis of fundamental constitutional considerations. The Court said:

> Any other rule than that [requiring the jury to take the law from the court] would bring confusion and uncertainty in the administration of the criminal law. . . .
>
> Public and private safety alike would be in peril, if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court and become a law unto themselves. Under such a system, the principal function of the judge would be to preside and

[9] See also *Rex* v. *Shipley*, 4 Doug. 73, 162-171, 99 Eng. Rep. 774, 820-824 (1784), and *Commonwealth* v. *Anthes*, 5 Gray (Mass.) 185, 202-222 (1857).

keep order while jurymen, untrained in the law, would determine questions affecting life, liberty, or property according to such legal principles as in their judgment were applicable to the particular case being tried. . . . And if it be true that jurors in a criminal case are under no legal obligation to take the law from the court, and may determine for themselves what the law is, it necessarily results that counsel for the accused may, of right, in the presence of both court and jury, contend that what the court declares to be the law applicable to the case in hand is not the law, and, in support of his contention, read to the jury the reports of adjudged cases and the views of elementary writers. . . . [I]f it be held that the court may not authoritatively decide all questions of law arising in criminal cases—the result will be that when a new trial in a criminal case is ordered, even by this court, the jury, upon such trial, may of right return a verdict based upon the assumption that what this court has adjudged to be law is not law. We cannot give our sanction to any rule that will lead to such a result. We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be. Under any other system, the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection equally of society and of individuals in their essential rights. When that occurs our government will cease to be a government of laws, and become a government of men. Liberty regulated by law is the underlying principle of our institutions. 156 U.S., at 101-103.

Explicit reference to the constitutional infirmity of the "jury as judge" rule is also found in opinions of Justices of this Court sitting on Circuit during the Nineteenth Century. See, e.g., the opinion of Mr. Justice Story in *United States* v. *Battiste*, 2 Sumner 240, Fed. Case No. 14,545, 24 Fed. Cas. 1042 (C.C. Mass., 1835):

> I hold it *the most sacred constitutional right* of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. 24 Fed. Cas., at 1043 (emphasis supplied).

See also the opinion of Mr. Justice Curtis in *United States* v. *Morris*, 1 Curt. 23, Fed. Case No. 15,815, 26 Fed. Cas. 1323 (C.C.Mass., 1851):

> My firm conviction is, that under the constitution of the United States, juries, in criminal trials, have not the right to decide any question of law. 26 Fed. Cas., at 1336.[10]

Numerous state cases either make explicit reference to the unconstitutionality of the system, *State* v. *Burpee*, 65 Vt. 1, 34-35, 25 A. 964, 974 (1892); *State* v. *Wright*, 53 Me. 328, 329, 338 (1865); *Commonwealth* v. *Porter*, 10 Met. (Mass.) 263, 278-280 (1845); and *Commonwealth* v. *Anthes*, 5 Gray (Mass.) 185, 227-236

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[10] And see *United States* v. *Greathouse*, 4 Sawyer 457, Fed. Case No. 15,254, 26 Fed. Cas. 18, 21 (C.C., N.D. Cal., 1863; Field, Circuit Justice); *United States* v. *Riley*, 5 Blatchf. 204, Fed. Case No. 16,164, 27 Fed. Cas. 810, 811-812 (C.C., S.D.N.Y., 1864). Cf. *Herron* v. *Southern Pac. Co.*, 283 U.S. 91, 95 (1931), a civil case where the Court stated that the "discharge of the judicial function as at common law," whereby the judge is not "a mere moderator," but determines questions of law, "is an essential factor in the process for which the Federal Constitution provides," citing *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 13, 14 (1899). And cf. *Stettinius* v. *United States*, 5 Cranch C.C. 573, Fed. Case No. 13,387, 22 Fed. Cas. 1322 (C.C., Dist. of Col., 1839).

(1857), or describe such defects in the system as would produce the conclusion that it is unconstitutional. *Pleasant* v. *State*, 13 Ark. 360, 372-373 (1853); *State* v. *Gannon*, 75 Conn. 206, 218-236, 52 A. 727, 732-738 (1902); *State* v. *Jeandell*, 5 Harr. (Del.) 475, 482-484 (1848-1855); *Brown* v. *State*, 40 Ga. 689, 695-698 (1870); *People* v. *Bruner*, 343 Ill. 146, 175 N.E. 400 (1931); *Montee* v. *Commonwealth*, 3 J.J.Marsh. (Ky.) 132, 149-52 (1830); *Hamilton* v. *People*, 29 Mich. 173, 189-193 (1874); *Williams* v. *State*, 32 Miss. 389, 396 (1856); *Parrish* v. *State*, 14 Neb. 60, 63 (1883); *Pierce* v. *State*, 13 N.H. 536, 551-554 (1843); *Roesel* v. *State*, 62 N.J.L. 216, 241-254, 41 A. 408, 417-422 (1898); *Duffy* v. *People*, 26 N.Y. 588, 591-593 (1863); *Pennsylvania* v. *Bell*, Addison 156, 160-161 (1793); *State* v. *Drawdy*, 14 Rich. (S.C.) 87, 90 (1866); *State* v. *Syphrett*, 27 S.C. 29, 32-34 (1887); *Harris* v. *State*, 7 Lea (Tenn.) 538, 548-555 (1881); and *State* v. *Dickey*, 48 W.Va. 325, 334, 37 S.E. 695, 699 (1900).

In the other states,[11] the rule was never in effect, or was rejected as incorrect or not in accord with the authorities or state statutes. *State* v. *Jones*, 5 Ala. 666, 672-673 (1843); *Pierson* v. *State*, 12 Ala. 149, 153-155 (1847); *People* v. *Anderson*, 44 Cal. 65, 70 (1872); *Dill* v. *People*, 94 Colo. 230, 234-235, 29 P. 2d 1035 (1933); *Johnson* v. *State*, 27 Fla. 245, 275, 9 So. 208, 212 (1891); *Terr.* v. *Alcantara*, 24 Haw. 197, 208-209 (1918); *Terr.* v. *Kaeha*, 24 Haw. 467, 471 (1918); *People* v. *Barnes*, 2 Ida. 161, 9 P. 532 (1886); *State* v. *Antheman*, 47 Ida. 328, 274 P. 805 (1929; *State* v.

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[11] Even in Maryland and Indiana, the courts have called the rule "anachronistic", *Slansky* v. *State*, 192 Md. 94, at 107, 63 A. 2d 599, at 604 (1949), and "archaic". *Beavers* v. *State*, *supra*, 236 Ind. at 556, 141 N.E. 2d, at 121.

Miller, 53 Iowa 154, 1956, 4 N.W. 900, 901-902 (1880); *State* v. *Truskett*, 85 Kan. 804, 118 P. 1047 (1911); *State* v. *Ford*, 37 La.Ann. 443, 465 (1885); *State* v. *Taunt*, 16 Minn. 109 (1870); *State* v. *Rheams*, 34 Minn. 18, 24 N.W. 302 (1885); *Hardy* v. *State*, 7 Mo. 607, 609 (1842); *State* v. *Koch*, 33 Mont. 490, 85 P. 272 (1906); *State* v. *Waterman*, 1 Nev. 543 (1865); *Terr.* v. *Kee*, 5 N.M. 510, 25 P. 924 (1891); *Terr.* v. *West*, 14 N.M. 546, 99 P. 343 (1908); *State* v. *Peace*, 46 N.C. 251, 257-264 (1854); *Dakota* v. *O'Hare*, 1 N.D. 30, 44 N.W. 1003 (1890); *State* v. *Barry*, 11 N.D. 428, 92 N.W. 809 (1902); *State* v. *Tolley*, 23 N.D. 284, 136 N.W. 784 (1912); *Montgomery* v. *State*, 11 Ohio 424, 427-428 (1842); *Commonwealth* v. *McManus*, 143 Pa. 64, 85, 21 A. 1018, 22 A. 761 (1891); *Commonwealth* v. *Bryson*, 276 Pa. 566, 120 A. 552 (1923); *Commonwealth* v. *Castellana*, 277 Pa. 117, 121 A. 50 (1923); *State* v. *Smith*, 6 R.I. 33, 34 (1859); *Terr.* v. *Stone*, 2 Dak. 155, 4 N.W. 697 (1880); *State* v. *Boughner*, 5 S.D. 461, 59 N.W. 736 (1894); *Nels* v. *State*, 2 Tex. 280 (1847); *State* v. *Anselmo*, 46 Utah 137, 148 P. 1071 (1915); *Dejarnette* v. *Commonwealth*, 75 Va. 867 (1881); *Hartigan* v. *Terr.*, 1 Wash. T. 447 (1874); *Stockman* v. *State*, 236 Wis. 27, 293 N.W. 923 (1940); and *Gardner* v. *State*, 27 Wyo. 316, 196 P. 750 (1921). See also Okla. Stat. Ann. §§ 22-832 and 22-834; Ore. Comp. L. Anno. § 26-928.[12]

[12] See also 9 Wigmore on Evidence (3rd ed.), § 2559, terming the rule an "ill-advised doctrine, defiant of the fundamentals of law." In Howe, *Juries as Judge of Criminal Law*, 52 Harv. L. Rev. 582 (1939), the power of the current against the "jury as judge" rule is shown by the demonstration of how courts have strained, when necessary, to abandon it. See also the vigorous attack on the rule by a distinguished judge of the Maryland Court of Appeals. Prescott, *Juries as Judges of the Law: Should the Practice Be Continued?*, 60 Md. St. Bar Ass'n Rep. 246 (1955).

This massive body of opinion in opposition to the "jury as judge" rule is powerful evidence of its fundamental unfairness. *Cohen* v. *Hurley*, 366 U.S. 117, 130, n. 11 (1961).

2. The court below stated that it was not bound to follow the holdings in other states that the rule is unconstitutional, "absent a decision of the Supreme Court" (R. 120; Appendix A, p. 10a). The Court below tacitly recognized that the "jury as judge" rule is unfair, citing the modifications that Maryland has made in the rule. These changes stem from Maryland's recognition of the harshness of its rule, but they do no more than leave an incoherent system, neither fish nor fowl. The court below set forth no argument in favor of the fairness of the rule, but relied only on the fact that it had previously sustained the rule, and on the fact that the rule was once accepted in other states. The appellants recognize the truism that the due process clause does not enforce uniformity upon the states, but the fact that a procedure was once accepted is by no means conclusive of its validity. *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Ferguson* v. *Georgia*, 365 U.S. 570 (1961) (see especially concurring opinions); *Mapp* v. *Ohio*, 367 U.S. 643, 651 (1961). Although the "jury as judge" rule may once have been thought to be of value to defendants,[13] its operation under present-day circumstances is grossly unfair, as demonstrated *infra*.[14]

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[13] See, e.g., Black, J., dissenting in *Galloway* v. *United States*, 319 U.S. 372, 399, n. 5 (1943).

[14] Cf. *Ferguson* v. *Georgia*, *supra*, 365 U.S., at 578-583, where this Court noted that the testimonial incapacity of criminal defendants, once viewed as essential to the rights of such defendants, has come to be considered a harsh burden on them.

The constitutional validity of the "jury as judge" rule is a question which is basic to the administration of criminal justice in Maryland, and this Court should resolve the issue on its merits.

B. The Effect of Allowing the Jury to Judge the Law Is So Fundamentally Unfair That It Constitutes a Violation of Due Process

1. It is irrational to charge a body of laymen with the function of judging the law, a function for which they are completely unsuited.[15] There is no basis for a proper exercise by them of such a function. They have no source of knowledge of the law, other than imagination, intuition, or perhaps, in some cases, bits and pieces of actual learning, supplemented by partisan argument of counsel.[16] Argument of counsel as to the law, including quotations from cases which may be from other jurisdictions, which may have been overruled in their own jurisdictions or expressly disapproved by the courts of the forum state, and which may be utterly deceptive to untrained minds, can do

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[15] "The selection of jurors from all classes of the people whose education and business cannot, as a general rule, have qualified them to decide legal questions, renders it unreasonable as well as apparently unsafe to require them to pass upon such questions." *Duffy* v. *People*, 26 N.Y. 588, 591 (1863).

[16] See *State* v. *Burpee*, *supra*, 65 Vt., at 33, 25 A., at 974: "Juries are usually composed of honest men, who desire to perform their duties to the best of their abilities, but they are usually unlearned in the law." See also opinion of Lord Mansfield in *Rex* v. *Shipley*, *supra*, 4 Doug., at 170, 99 Eng. Rep., at 824: "[U]pon the reason of the thing, and the eternal principles of justice, the jury ought not to assume the jurisdiction of the law. As I said before, they do not know, and are not presumed to know, anything of the matter; they do not understand the language in which it is conceived, or the meaning of the terms. They have no rule to go by but their affections and wishes."

no other than make confusion more complete.[17] "Intelligent as jurors may be on general subjects, they are incompetent, from want of learning and training in the line of law, to assume the great responsibility of adjudging the law." *State* v. *Dickey*, 48 W.Va. 325, 334, 37 S.E. 695, 699 (1900).

2. Decision of the law by the jury deprives the accused of the right to be tried by the fixed law of the land, a right which is essential to due process. "Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it." *United States* v. *Battiste*, *supra*, 24 Fed. Cas., at 1043.[18]

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[17] See also *Pleasant* v. *State*, 13 Ark. 360, 373 (1853), characterizing the "jury as judge" rule as "a heresy that is subversive of all law."

[18] See also Wade, *Jurors as Judges in Criminal Cases*, 3 Cr. L. Mag. 484, 497-498 (1882): "Safety comes to the people, and life, liberty, and property are secure, when no one can be deprived thereof except by 'due process of law,' and when, in the adjudication of public and private rights, judicial authority speaks the pure voice of the law—'the law of the land.' The doctrine that jurors are judges of the law in criminal cases, abolishes the sacred 'law of the land,' which, since the days of King John and *Magna Charta*, has been the birth-right of all English-speaking people, and tends to the exercise of irresponsible arbitrary power. They are judges whose decisions cannot be reviewed. Their decrees are irrevocable and final. If they set aside a constitution or a statute, their act cannot be questioned. If, in the jury-room, they legislate and enact a law for the case in hand, it never sees the light of day; it is a mystery and a myth; no one can lay his hands upon it; no one can construe or interpret it; it affords no guide for the future, for it vanishes into nonentity the moment the verdict is returned, and the verdict makes no sign; the decision and the judges quickly disappear."

There can be no certainty in the law when it is judged by the jury. *State* v. *Wright, supra,* 53 Me., at 338; *State* v. *Dickey, supra,* 48 W.Va., at 334, 37 S.E., at 699; *Parrish* v. *State, supra,* 14 Neb., at 63, 15 N.W., at 358. Any jury may disregard the decisions of all prior juries and of all courts. They may disregard legislative enactments and constitutional requirements. "If the court had no right to decide on the law, error, confusion, uncertainty and licentiousness, would characterize the criminal trials; and the safety of the accused might be as much endangered, as the stability of public justice, would certainly be." *Montee* v. *Commonwealth, supra,* 3 J.J.Marsh., at 151.

This lack of certainty is triply vicious. First, the individual has no sure way of conforming his behavior to the law, for he has no way of knowing what the law, as applied to his behavior, will be. That will depend on the view of the law to be taken by the particular jury before which he may be tried.[19] Second, an accused on trial will be unable to defend himself adequately, for he cannot know what law the jury will choose to apply to him. Third, even after conviction, the prisoner will not know of what crime he stands convicted.[20] By returning the general verdict of guilty, after having acted as judges of the law, the jury will have left him as ignorant as ever of their view of the

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[19] The *ex post facto* overtones are serious. Cf., e.g., *Hamilton* v. *People, supra,* 29 Mich., at 191.

[20] "When the determination of the law of a case is left to the whims and caprices of jurymen, there is no way of knowing with certainty what they have held it to be." *Parrish* v. *State, supra,* 14 Neb., at 63, 15 N.W., at 358.

law. The fundamental unfairness of all three aspects of the procedure is clear.[21]

It is true, of course, that these abuses always lie within the *power* of the jury. The existence of the power, however, cannot justify relaxation of the mechanisms developed to restrict its operation as much as possible. To acknowledge that human frailty makes absolute justice impossible is not to deny that certain procedures are required by justice. Long experience of the common law in England and the vast majority of jurisdictions in the United States has led to the view that the best hope for securing a trial under law is for the judge to instruct the jury on the law. No machine is yet available to apply the law, and the fact that a jury's power to disregard the law subsists does not derogate from the crucial importance of a "binding" instruction from the court.[22]

The uncertainty introduced into the criminal procedure by requiring juries to judge the law infects all criminal statutes with the vice of vagueness. Prescription of a penalty for violation of a prohibition cast in vague and uncertain terms constitutes a denial of due process. *Champlin Refining Co.* v. *Corporation*

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[21] "[I]t would be difficult to conceive of a more odious system of judicature than that by which a man would be tried by a law of which he was not merely ignorant, but of which he could not possibly inform himself, inasmuch as it would be locked up in the breasts of his triers until the verdict was rendered." *State* v. *Syphrett*, *supra*, 27 S.C., at 32. See also the opinion of Lord Mansfield in *Rex* v. *Shipley*, *supra*.

[22] Cf. *State* v. *Boyle*, 104 N.C. 800, 827, 10 S.E. 696, 698 (1890): "Trial by jury is worthy of all commendation as a method for the ascertainment of truth, but to make it efficient, and what the law contemplates it shall be, requires the superintending and directing aid of the Court."

Commission, 286 U.S. 210, 243 (1932). "It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." *Ibid.*

It is true that the cases in this Court involving the vice of vagueness have all involved particular statutory language found to be too uncertain to be valid as criminal prohibition. The *rationale* of these cases, however, applies equally to a system of adjudication whose operation makes the terms of all statutes fatally unclear. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939).[23]

To abandon the system of judicial interpretation of criminal law for the absolute uncertainty of the wavering, unreasoned and unknown *ad hoc* determinations of varying juries is to abandon fair procedure.[24]

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[23] See also *Musser* v. *Utah*, 333 U.S. 95, 97 (1948): "Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused."

[24] "Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be. Under any other system, the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection equally of society and of individuals in their essential rights. When that occurs our government will cease to be a government of laws, and become a government of men. Liberty regulated by law is the underlying principle of our institutions." *Sparf and Hansen* v. *United States*, 156 U.S., at 102-103. And see *Hamilton* v. *People*, 29 Mich. 173, 191 (1874), and *Duffy* v. *People*, 26 N.Y. 588, 591-592 (1863).

3. A state may not constitutionally convict without any evidence of guilt, and this Court must be available to enforce that prohibition. *Thompson* v. *Louisville*, 362 U.S. 199 (1960). When the jury determines the law, reviewing courts, and ultimately this Court, have no way of ascertaining whether, under the view of the law taken by the jury, there was any evidence at all to sustain a conviction. There may have been evidence to sustain a conviction under the view of the law which the court would take, but the jury may well have rejected that view, and acted upon an entirely different one. For example, a jury may decide that the law of rape condemns any intercourse with a previously chaste, unmarried female. Then, the jury may convict on the ground that the defendant has not proved the prosecutrix to be unchaste, despite a total lack of evidence that she was chaste. The reviewing court may sustain the conviction on the ground that, under *its* view of the law, which does not include the requirement of chastity, the prosecution produced evidence of guilt. Thus a conviction not based on any evidence of guilt of the crime for which the jury convicted may be sustained because a reviewing court finds evidence of another crime. In addition to making unenforceable the due process requirements of *Thompson* v. *Louisville*, such a procedure violates the due process requirement that a defendant not be convicted for one offense and have his conviction sustained for a different offense. *Cole* v. *Arkansas*, 333 U.S. 196 (1948).

Under the generally-prevailing jury system, when the judge gives binding instructions to the jury, a reviewing court is able to consider the correctness of those instructions and decide whether a conviction thereunder was proper. The reviewing court, in so doing, can reasonably assume that the conviction was

based on the law as expounded by the trial court. *Cole* v. *Arkansas* forbids the reviewing court to uphold the conviction for any violation other than that submitted to the jury. Under the "jury as judge" system, the reviewing court cannot obey *Cole* v. *Arkansas*, for the reviewing court knows only what law the judge suggested to the jury it might apply.

A jury may take the view that the law forbids any intercourse by a Negro with a white woman, and convict even though it finds there was consent by the woman. The reviewing court must affirm if it finds sufficient evidence of lack of consent, thus doing what *Cole* v. *Arkansas* forbids. The jury may have convicted under the rape law of any state which may have appealed to them, yet the reviewing court can only uphold the conviction under Maryland rape law. It is no answer to say that the appellate court's opinion that Maryland law was fulfilled by the evidence is enough to accord the accused his rights, for that is the very view which was condemned by *Cole* v. *Arkansas*.

C. The System Whereby Differing Juries are Permitted to Reach Differing Legal Conclusions Is a Violation of Equal Protection

The equal protection clause of the Fourteenth Amendment guarantees that the law will not lay "an unequal hand on those who have committed intrinsically the same quality of offense." *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942).

A law need not be partial on its face to meet the condemnation of the equal protection clause. If its application is such "as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal

justice is still within the prohibition of the Constitution." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 374 (1886).

By the operation of the "jury as judge" rule, all laws are rendered dangerously susceptible to unequal application.[24a] Government of laws is transformed into government of men.

Reference must again be made to the possible argument that even the system of judicial interpretation of the law produces no mechanical guarantee of equal application. The answer must still be that the exposition of the law by judges is the best guarantee of equality our system has been able to devise. That it is imperfect would not justify turning over the task of interpreting the law to a roll of the dice. Neither does it justify turning that task over to juries. The right of each jury to enforce its particular view of the law abolishes any guarantee of equality under the law as completely as would the roll of the dice. "The enforcement of the right of everyone to equal protection of the law, which is the same for all, is sometimes difficult, but if [the jury may judge the law], it would

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[24a] "It is this fundamental principle of the common law, that the adjudications of the highest tribunal, or court of last resort, in matters of law, shall stand as rules of law in all similar cases, which makes it necessary, in every system of jurisprudence following the common law, that all decisions in matters of law, made by subordinate courts and judges, shall in some mode be reexaminable, and in some form be brought before the court of last resort, to one tribunal, one judicial mind and judgment, whether vested in one or many persons, in order that the rules of law may be uniform throughout the whole extent of territory subject to the same government, that all the inhabitants alike owning allegiance shall stand equal before the law, alike entitled to its protection and benefits, and alike amenable and punishable for its violation." *Commonwealth* v. *Anthes*, *supra*, 5 Gray, at 195.

become well-nigh impossible." *State* v. *Gannon, supra*, 75 Conn., at 218-219, 52 A., at 732.

For the reasons outlined, the trial afforded to the appellants by the State of Maryland, under the Maryland constitutional procedure, was so unfair as to violate the due process and equal protection clauses of the Fourteenth Amendment. The appellants were subjected to the whims and vagaries of the judicial views of the particular jurors who happened to try them. They were never informed of what law those jurors would apply, and they do not know it now. The judgment which sends them to their deaths, for violation of the law as determined by the jurors, raises substantial federal questions, and should be reviewed by this Court.

II. THE FAILURE OF THE TRIAL JUDGE TO GIVE ANY INSTRUCTIONS WHATSOEVER TO THE JURY ON THE APPLICABLE LAW RENDERED THE APPELLANTS' TRIAL VIOLATIVE OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT

A. The question whether a denial of due process results from the failure of a trial judge to give any instructions whatsoever to a jury in a capital case appears to be presented in this case for the first time. There are decisions in every jurisdiction concerning the lack of some particular instruction, but no felony case has been found involving, as here, a total lack of instructions. The apparent uniqueness of the instant case in this respect can be traced to the relationship between the lack of instructions and the "jury as judge" rule, which, as shown above, is also a rarity today.

In the vast majority of jurisdictions, "a mandatory duty exists on the part of the trial judge to instruct the jury as to the fundamental principles of law which control the case." *State* v. *Butler*, 27 N.J. 560, 595, 143 A. 2d 530, 550 (1958). Consequently, "It [is] error of the highest degree to submit the case to the jury without adequate instructions as to the law allegedly violated." *United States* v. *Levy*, 153 F. 2d 995, 999 (C.A. 3, 1946). Thus, regardless of whether the point is preserved in the trial court, far more limited omissions in instructions than that presented in this case are held to cause such unfair trials that the resulting verdicts cannot stand. *State* v. *Betts*, 71 Ariz. 362, 370-371, 227 P. 2d 749, 754-755 (1951); *People* v. *Putnam*, 20 Cal. 2d 885, 890, 129 P. 2d 367, 369-370 (1942); *Hamilton* v. *State*, 96 Ga. 301, 302, 22 S.E. 528 (1895); *State* v. *Wheeler*, 216 Iowa 433, 435, 249 N.W. 162 (1933); *State* v. *Smith*, 161 Kan. 230, 234-237, 167 P. 2d 594, 597-599 (1946); *People* v. *Guillet*, 342 Mich. 1, 4-7, 69 N.W. 2d 140, 142-144 (1955); *State* v. *Butler*, 27 N.J. 560, 594-595, 143 A. 2d 530, 550 (1958); *People* v. *Wallens*, 297 N.Y. 57, 62-63, 74 N.E. 2d 307, 310 (1947); *State* v. *Ardrey*, 232 N.C. 721, 62 S.E. 2d 53 (1950); *Miles* v. *State*, 41 Okl. Cr. 283, 290-291, 273 P. 284, 286 (1928); *State* v. *Osborne*, 200 S.C. 504, 516-517, 21 S.E. 2d 178, 183 (1942); *Bishop* v. *State*, 199 Tenn. 428, 287 S.W. 2d 49 (1956); *Polanke* v. *State*, 33 Tex. C.R. 634, 28 S.W. 541, 542 (1894); *State* v. *Loveless*, 139 W.Va. 454, 469-470, 80 S.E. 2d 442, 450-451 (1954); *Gardner* v. *State*, 27 Wyo. 316, 335, 196 P. 750, 754 (1921). See also *Owen* v. *People*, 118 Colo. 415, 423, 195 P. 2d 953, 957 (1948); *Barton* v. *Comm.*, 238 Ky. 356, 361, 38 S.W. 2d 218, 220 (1931); *State* v. *Griffin*, 289 S.W. 2d 455, 458 (St. Louis, Mo., Court of Appeals, 1956); *Jones* v. *State*, 147 Neb. 219, 222-223,

22 N.W. 2d 710, 712 (1946); *Meyers* v. *Comm.*, 83 Pa. 131, 143 (1876).[25]

The basis for the prevailing attitude towards the necessity for instructions is the recognition that jurors are not qualified to judge the law. "To fail to define the offense attributed to the accused and the essential elements which constitute it, is to assume that jurors are educated in the law—an assumption which no one would undertake to justify." *State* v. *Butler*, *supra*, 27 N.J., at 595, 143 A. 2d, at 550.[26] See also *State* v. *Loveless*, *supra*, 139 W.Va., at 469-470, 80 S.E. 2d at 450-451, and the authorities cited and quoted, *supra*, pp. 17-18. And of course these jurisdictions do not

[25] The above authorities from 20 jurisdictions are not comprehensive, but in the course of research into that sample, only one jurisdiction was noted where a contrary rule prevails. In *Davis* v. *State*, 173 Miss. 783, 788, 163 So. 391, 392 (1935), it is stated that "The court is powerless to give an instruction unless asked . . . ." *Gangloff* v. *State*, 232 Miss. 395, 399-400, 99 So. 2d 461, 464 (1958) shows that this Mississippi rule is the result of a statutory provision precluding a trial judge from giving any instruction which is not requested in writing. In the states of Kansas, Missouri, North Carolina and Wyoming, from which cases are cited in the text above, there are statutes which are construed in the cited cases to require a charge to the jury. In Michigan, on the other hand, there is a statute which would on its face preclude the appellate court from reversing a conviction upon the basis of any omission in the instructions unless an instruction on the point was requested of the trial judge, but the Michigan Supreme Court in the case cited above limits the application of this statute to non-essential instructions. The Tennessee Supreme Court resolved a similar statutory problem in the same manner in the case cited above.

[26] It is noteworthy that in the one exception to the prevailing attitude toward omitted instructions, see note 25 *supra*, the court stated that "in the absence of an instruction so defining, we must presume that the jury understood the essential elements of the crime." *Davis* v. *State*, *supra*, 173 Miss., at 788, 163 So., at 392.

give the jury the right to judge law (see the authorities cited *supra*, at pp. 13-15), for to them "It is self-evident that the jury must have the law given to it in order that it can perform its function." *Morris* v. *United States*, 156 F. 2d 525, 531 (C.A. 9, 1946). Consequently, virtually all jurisdictions other than Maryland are frequently faced with the issue of whether an instruction on some particular point has been waived, and resolve the issue by determining whether the omitted instruction was "fundamental",[27] or "necessary"[28] or by determining whether the omission constitutes "plain error".[29] If the determination is affirmative, then there can be no waiver, for the omission has resulted in an unfair trial. It is therefore natural that in such jurisdictions a trial in a capital case would never occur where there were no instructions given. If such a situation should occur, then *a fortiori* there could be no question of waiver, for the trial would be considered to be grossly unfair.

The total lack of instructions in this case did occur, however, and it is explained by the unique premises operating in Maryland. As Justice Story stated: "If I thought, that the jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial." *United States* v. *Battiste*, *supra*, 24 Fed. Cas., at 1043. Similarly, the New York Court of

[27] E.g., *Bishop* v. *State*, 199 Tenn. 428, 287 S.W. 2d 49 (1956); *Gardner* v. *State*, 27 Wyo. 316, 335, 196 P. 750, 754 (1921).

[28] E.g., *People* v. *Putnam*, 20 Cal. 2d 885, 890, 129 P.2d 367, 369-370 (1942).

[29] The federal rule is of course based upon such a determination under Rule 52(b) of the Federal Rules of Criminal Procedure. E.g., *Tatum* v. *United States*, 190 F. 2d 612, 615 (C.A.D.C., 1951).

Appeals has pointed out as a reason why it is a denial of a fair trial when a jury is uninstructed that "the jury necessarily acted as a judge of both the law and the facts." *People* v. *Wallens, supra,* 297 N.Y., at 61, 74 N.E. 2d, at 309. In Maryland, it is considered fair and rational for jurors to determine the applicable law, and correspondingly it is acceptable for the jurors to do so out of whole cloth.[30] Absent the premise that jurors may properly determine the law as they see fit, there can be no doubt that the present case could not have arisen; the fact that this premise is the rule of law in Maryland explains why the jury was wholly uninstructed in the instant case.

Even if the "jury as judge" rule is valid, so that a judge's instructions may only be advisory, the complete absence of even advisory instructions made such a mockery of the trial below as to deny to the appellants their Fourteenth Amendment right to a fair trial. Why an uninstructed jury in a capital case is fundamentally unfair is plain, for each of the aspects of unfairness resulting from the "jury as judge" rule discussed in the previous section hereof is aggravated by the absence of even advisory instructions to the jury. Indeed, the problems of uncertainty, arbitrariness and unrestrained prejudice are strikingly obvious in a case such as the instant one. The jury in this case was literally left to itself to create the elements of, and

[30] That the Court of Appeals of Maryland itself sees the unfairness of an uninstructed jury is indicated in *Slansky* v. *State, supra,* 192 Md., at 107-108, 63 A. 2d, at 605, where the court states that it recommends that trial judges instruct juries. In the instant case, the Court of Appeals rejected appellants' argument that this recommendation should be mandatory in capital cases at least.

defenses to, the crime of rape. Just as inimical to a fair trial was the lack of any instructions with respect to the presumption of innocence or reasonable doubt. Lacking any instructions, only the jurors can know the basis for their verdict in this case; it is no more justified to presume the verdict's conformity to law than it is to presume that appellants were convicted of being Negroes who had intercourse (or were present while companions had intercourse) with a white woman. Under such circumstances, the irrationality of the entire process of determining guilt is manifest. The appellants submit that nothing could more plainly violate the due process clause of the Fourteenth Amendment than the verdict in this capital case where the jurors had no standards by which to evaluate the evidence and determine guilt. In truth, "It cannot be said that a fair and impartial trial has been had unless the jury has been properly instructed as to the law of the case." *Miles* v. *State*, 41 Okl. Cr. 283, 290, 273 P. 284, 286 (1928). See *Screws* v. *United States*, 325 U.S. 91, 106-107 (1945); *Bollenbach* v. *United States*, 326 U.S. 607, 614-615 (1946). Furthermore, the real possibility that "unjust and illegal discriminations" occurred between appellants and "persons in similar circumstances" because of the total lack of guidance on the law from the trial judge brings this case within the proscriptions of the equal protection clause. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 374 (1886).

B. The appellants plainly presented to the Court of Appeals of Maryland the issue whether a denial of due process results from the failure of the trial judge to give any advisory instructions whatsoever in a capital case even where not requested. The Maryland Court's opinion correctly stated the issue presented and

decided it adversely to appellants. (R. 125; Appendix A, p. 14a). It held that the right to instructions, even if a constitutional right, had been waived by the failure to request any instructions or to object to the failure of the trial judge to instruct (R. 127; Appendix A, p. 15a). The Court of Appeals also held that the absence of instructions was not "plain error" under Maryland Rule 756(g) because the lack of instructions resulted from the "trial tactics" of the appellants' court-appointed counsel (R. 127; Appendix A, p. 15a). The question was, however, whether the lack of any instructions amounts to a denial of a fair trial. Certainly it is no answer to the issue of whether a verdict based upon the flip of a coin is a denial of due process to assert that the right to a jury trial had been waived, for the issue is the constitutional validity under any circumstances of the procedure used to determine guilt in lieu of that which had been waived. In short, the appellants are contending that the lack of instructions results in the denial of a fair trial; and a fair trial, we maintain, cannot be waived.

CONCLUSION

For the foregoing reasons, the questions involved in this case are substantial, and the Court should note probable jurisdiction.

Respectfully submitted,

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February, 1963

Proof of Service

I, Hal Witt, one of the attorneys for James V. Giles and John G. Giles, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of February, 1963, I served a copy of the foregoing Jurisdictional Statement on the State of Maryland, appellee herein, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to the Attorney General of the State of Maryland, Baltimore, Maryland.

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Attorney for Appellants.

APPENDIX

APPENDIX A

Opinion and Judgment Below

IN THE COURT OF APPEALS OF MARYLAND

No. 312 — September Term, 1961

JAMES V. GILES AND JOHN G. GILES

v.

STATE OF MARYLAND

(Filed July 18, 1962)

Before BRUNE, C. J., HENDERSON, HAMMOND, HORNEY, MARBURY and SYBERT, JJ., and HARRIS (MORGAN C.), J., Specially Assigned.

OPINION BY HORNEY, J.

James V. Giles and John G. Giles were found guilty by a jury of raping a sixteen-year old girl and were sentenced to death. From the judgment and sentence entered on the verdict they have appealed to this Court.

About midnight on July 20, 1961, Joyce Roberts and Stewart Foster and two other young men went to a secluded spot in Montgomery County near a dam on the Patuxent River to go swimming. But when other friends they were expecting did not appear, they started to leave and ran out of gas. Joyce and Stewart remained in the automobile while the other two young men set out to get gas.

Shortly thereafter when the stranded man and girl saw three young colored men (the Gileses and Joseph Johnson) approaching, Stewart became alarmed and rolled up the windows and locked the doors. The trio first demanded money and cigarettes, but were told by Stewart that he had neither. One of the intruders, using obscene and vulgar language, threatened to drag the man out of the automobile and carnally know the girl. And when Stewart refused to turn the girl over to them and warned them they would get

into trouble, one or more of them threw rocks at the automobile, shattering the windows, and reached in and unlocked the doors. As Stewart jumped out of the automobile to hold off the attack he was struck in the face with a rock and knocked unconscious. At the same time Joyce, not knowing that Stewart had been knocked out, got out of the other side of the vehicle and fled into the woods. She had gone only a short distance when she tripped and fell. She remained where she fell in the underbrush trying to hide.

After this episode, the evidence as to what took place is conflicting. Joyce testified that the several acts of intercourse were forcibly had against her will and without her consent. On the other hand, John denied that he had ever had intercourse with the girl. And James, though admitting intercourse, claimed that it was with her consent.

According to the girl, John was the first to find her. He laid on top of her until James and Joseph also arrived. In the meantime she pleaded with John to let her go farther into the woods to avoid being found by the other two and told him that he could follow her later. She thought that if she could get away from him she could get away from all of them. After discovery by the trio, although they neither threatened her at that time nor beat her, they leaned over her and began kissing her, and one of them reached for the zipper on her shorts. She protested but was told "either you do it or we will do it." She thought it would be senseless to scream or struggle to get away, and, knowing that she was alone in the woods with three demonstrably violent young men and afraid for her life, she complied with their demand and removed her own shorts and laid them aside. She was then subjected to successive rapings, first by John, then Joseph, and finally James. During the final attack, she heard Stewart, who had regained consciousness, cry out that he was going for the police, but before she could call to him for help, she heard him running off.

According to John, he followed the girl into the woods, though he claimed he did not then know that she was a

woman. Although she suggested that he could, he did not have intercourse with her. They sat in the woods five or ten minutes and kept quiet to avoid being found by James and Joseph. The girl told him that if he would help her get away, she would let him have intercourse with her. He attempted to help her by keeping quiet, but when they moved they were heard and their whereabouts discovered by the other two with the aid of the girl calling to them. She told them she knew what they wanted and disrobed herself to the waist and stipulated the order in which they were to have intercourse with her. [The girl told the police that John had not had intercourse with her and repeated what she had told the police at the preliminary hearing, but at the trial, though admitting that she had previously stated that he had not, she testified that she had not told the truth and that John too had had sexual relations with her on the night in question.]

According to James, he went into the woods only to look for his brother John and not for the girl. She called him over to where she was, took her clothes off and insisted that he have intercourse with her. He did not know whether John had had intercourse with the girl.

When Stewart regained consciousness, he heard Joyce "whimpering" in the woods and immediately made his way to the home of a nearby resident to have the police called. Sergeant Alton Duvall arrived on the scene within a few minutes, and the young men fled. The police officer and Stewart found the girl lying on the ground, practically naked, sobbing and in a dazed condition. But when she was seen by the nearby resident as she came out of the woods, she appeared to him to be calm, cool and collected. A physical examination revealed that the girl had abrasions on her shoulders, knees and legs and that she had recently had sexual intercourse.

James, having spent the night hiding in the woods, was arrested at his home the next morning, but John, who had spent most of the intervening time hiding in the woods, was

not apprehended until two or three days later. In statements to the police following their arrest, James admitted that he had thrown rocks at the automobile; that he had chased the girl into the woods; that he argued with his brother as to who would be first to have intercourse with her; that he had intercourse last, after John and Joseph; and that he was having intercourse with the girl when the police car arrived. John, in his statement, admitted his presence at the scene of the crime; that he had chased the girl into the woods; but denied that he had had intercourse with her.

Seven questions are presented by the appeal. We shall consider them, not in the order presented but in what appears to us to be a logical sequence.

(i)

The appellants contend that it was prejudicial error *per se* and a violation of their constitutional rights not to have had a member of their own race on the jury panel. The claim is without merit.

The record discloses that the defendants, instead of challenging the array of prospective jurors at the outset of the trial, in accordance with the accepted practice, moved, at the very end of the trial, for a mistrial because there were no Negroes on the jury panel which tried the case. We think the objection may have come too late to raise a question as to the composition of the jury, but that is a question we need not decide, for even if it is assumed, without deciding, that the question was not waived, there was no evidence that Negroes had been intentionally excluded and, which is more important, there was no showing of any prejudice whatsoever to the defendants. Indeed, they concede it could not be shown that members of the Negro race had been systematically excluded from previous Montgomery County jury panels.

When the absence of Negroes from a jury panel is not by design, a defendant is not thereby denied a fair and impar-

tial trial. See *Jackson* v. *State*, 180 Md. 658, 26 A. 2d 815 (1942); *Zimmerman* v. *State*, 191 Md. 7, 59 A. 2d 675 (1948), *aff'd.* 336 U.S. 901 (1949). And cf. *Rayne* v. *Warden*, 223 Md. 688, 165 A. 2d 474 (1960), *cert. den.* 365 U.S. 854 (1961). The subject was exhaustively discussed by Judge Soper in *U.S. ex rel. Jackson* v. *Brady*, 133 F. 2d 476 (4th Cir. 1943), *affirming* 47 F. Supp. 362 (D.C. Md. 1942), *cert. den.* 319 U.S. 746 (1943), *reh. den.* 319 U.S. 784 (1943), where it was held that a colored citizen charged with crime has no constitutional right to have his race represented on a trial jury and the mere fact that no Negroes were on a particular jury panel does not prove that they were excluded because of their race.

(ii)

The appellants insist that the trial court should have asked the prospective jurors on their *voir dire* a question they requested: "Have any one of you any bias or prejudice against a defendant who is a Negro, when the complaining witness is a white woman?" But instead of the proposed question, the court asked: "Do you have any bias or prejudice with respect to the Negro race such as would preclude you from giving a Negro a fair and impartial trial as you would a white man?"

While the court might well have asked the proposed question, we do not think that failure to do so deprived the defendants of a jury that was competent and qualified to try them. Since the only purpose of a *voir dire* examination is to probe for the existence of cause for disqualification, we think the general question asked was sufficient to determine whether any juror was biased or prejudiced for or against the defendants and whether his mind was free to hear and impartially consider the evidence and render a fair and impartial verdict thereon. See *Garlitz* v. *State*, 71 Md. 293, 18 Atl. 39 (1889). Cf. *Kujawa* v. *Baltimore Transit Co.*, 224 Md. 195, 167 A. 2d 96 (1961).

In *Lee* v. *State*, 164 Md. 550, 165 Atl. 614 (1933), *cert. den.* 290 U.S. 639 (1933), this Court approved a *voir dire* question designed to ascertain whether the prospective jurors could "give the defendant [a Negro] as fair and impartial a trial as [they] could a white man, and give him the same advantage and protection as you would a white man upon the same evidence," and then added that "this is all the traverser, white or colored, is entitled to receive." We see little distinction between the intent and purpose of that question and the result sought to be obtained by the question asked in the instant case. Clearly, both were designed to elicit all that a defendant is entitled to probe for in a case such as this—the possible existence of cause for disqualification on account of racial bias or prejudice. Cf. *Contee* v. *State*, 223 Md. 575, 165 A. 2d 889 (1960).

The question asked by the trial court was sufficient to disclose racial bias and prejudice. See *Humphreys* v. *State*, 227 Md. 115, 175 A. 2d 777 (1961). And see the cases collected in the Annotation, *Juror—Racial or other Prejudice*, 54 A.L.R. 2d 1204, 1210, *et seq.* Furthermore, the general question asked removed the necessity of also asking the more specific one. *Glaros* v. *State*, 223 Md. 272, 164 A. 2d 461 (1960).

(iii)

The defendants have raised two questions with respect to rulings on the evidence.

First, they dispute the correctness of the refusal to permit the prosecuting witness to testify on cross examination whether she had ever had a venereal disease and whether her parents allowed her to go out late at night. The sustaining of the objections to these questions was not improper. While the rule is that when consent is asserted as a defense in a rape case, the *general* character or reputation (as distinguished from *specific* acts) of the prosecuting witness with respect to chastity or unchastity is

admissible, the questions as framed did not go to her general character or reputation for chastity.

The first question (relating to a venereal disease) would certainly have also permitted a probing into *specific* acts, and, even if it had been answered in the affirmative, it would have had no probative value on the issue of consent. If in fact the prosecutrix had a venereal disease, she could have contracted it from the defendants; or by means other than intercourse; or by a single previous sexual experience with another, an inquiry into which is forbidden by the rule in *Schartzer* v. *State*, 63 Md. 149 (1885), to the effect that a prosecutrix cannot be asked whether she had previously had intercourse with a person other than the accused. And see the recent case of *Humphreys* v. *State*, *supra*, which reaffirmed and reapplied the *Shartzer* ruling. See also the annotations in 65 A.L.R. 410 and 140 A.L.R. 364, which point out that Maryland follows a different rule from that in some of the other states with respect to cross examination as to prior immorality and unchastity.

The second question (relating to the keeping of late hours) also has no probative value in determining prior character or reputation of the prosecutrix for unchastity. Such an inquiry—like the question in the *Humphreys* case with respect to the reputation of the prosecutrix for having associated with colored men—would not give rise to an inference, even if true, that she was unchaste. We think this question as framed was clearly objectionable as to substance, but even if it is assumed that the inquiry was aimed at the reputation of the prosecutrix for staying out late at night (and not at the reputation for having parents that allowed her to do so), the question was nevertheless a collateral one that was irrelevant under the *Humphreys* ruling, and was therefore properly excluded. Cf. *State* v. *Brown*, 241 N.W. 591 (Minn. 1932). Moreover, since the defendants made no attempt to follow up the disputed question with one that might have been admissible or make a proffer of what they intended to establish by the

objectionable question, they cannot now be heard to complain. It is for this reason that the case of *State* v. *Franklin*, 79 S.E. 2d 692 (W. Va. 1953), relied on by the defendants, is not authority on which to base a holding of prejudicial error in this case.

The second of the evidence questions concerns the refusal of the trial court to permit the defendants to interrogate Lt. Lloyd M. Whalen on direct examination about a prior statement allegedly given by the officer to a newspaper which was inconsistent with his testimony at the trial. The claim is that the court improperly limited the impeachment of the witness and that such action constituted reversible error. Such is not the case; and, since the contention is wholly without merit, our comments will be brief. The defendants could not impeach a witness (hostile or not) they had called as their own, without first showing to the satisfaction of the court that they were taken by surprise or had been entrapped, which they concede they could not do because the alleged inconsistent statement had not been made to the defendants, or their attorney, or to some person to be communicated to them. See *Bruce* v. *State*, 218 Md. 87, 145 A. 2d 428 (1958), and the cases therein cited. And cf. *Parker* v. *State*, 227 Md. 468, 177 A. 2d 426 (1962).

(iv)

The defendants contend that the trial court should have directed a verdict of not guilty because the evidence was insufficient in law to sustain a conviction. The contention is without substantial merit.

There was some evidence tending to indicate consent on the part of the prosecuting witness, which, if believed by the trier of facts, would have been a complete defense to the charge of rape. But there was also evidence of violent acts and verbal threats on the part of the defendants, which, if believed, would have been the equivalent of such force as was reasonably calculated to create in the mind of the

prosecutrix an apprehension of imminent bodily harm that could have impaired or overcome her will to resist. See *Hazel* v. *State*, 221 Md. 464, 157 A. 2d 922 (1960), where it was said (at p. 469): "There is, however, a wide difference between consent and a submission to the act. Consent may involve submission, but submission does not necessarily imply consent. Furthermore, submission to a compelling force, or as a result of being put in fear, is not consent." Since there was legally sufficient evidence from which the jury could find as it did, the question, as to whether the intercourse had been consented to or had been accomplished by force, was clearly one to be resolved by the trier of facts, and the case was therefore properly submitted to the jury.

(v)

The defendants further contend that Section 5 of Article XV of the Constitution of Maryland, providing that the jury in criminal cases shall be judges of the law as well as the facts, violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. We think not. The defendants, though recognizing that the same contention (at least in so far as due process was concerned) was made, but was rejected by this Court, in *Slansky* v. *State*, 192 Md. 94, 63 A. 2d 599 (1949), request us to reexamine the holding of that case.[1] There, in holding that the constitutional rights of the defendant had not been abridged, we pointed out that the due process clause of the Fourteenth Amendment does not require the states to conform their criminal procedure to that of the federal courts, but left the states free to work out their own systems of criminal procedure as they had done for many years both before and after the adoption of the

[1] The holding in *Slansky* v. *State*, 192 Md. 94, with respect to the constitutional question here involved was reaffirmed in *Hopkins* v. *State*, 193 Md. 489, without elaboration.

amendment, and cited such cases as *Bute* v. *Illinois*, 333 U.S. 640 (1948); *Fay* v. *New York*, 332 U.S. 261 (1947); *Foster* v. *Illinois*, 332 U.S. 134 (1947); and *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22 (1922). The question, after an exhaustive review of the historical basis for the state constitutional provision and the cases and other authorities on the point, was carefully considered in the *Slansky* case and we see no reason to reach now a conclusion contrary to what we reached then. So far as we are advised, the Supreme Court of the United States has not rendered any decision since *Slansky* which would now require a different result from that there reached by this Court.

We recognize, of course, as we did in *Slansky*, that all other states (with the exception of Maryland and Indiana[2]) have either done away with or trimmed down the concept of a jury being judge of the law as well as the facts. But we were of the opinion then, as we are now, that § 5 of Art. XV is not unconstitutional and that we are not bound, absent a decision of the Supreme Court to the contrary, to follow the rulings in other jurisdictions[3] with respect to similar constitutional provisions in other states, even though some of the cases[3] have held that a state may not permit juries to determine the law in criminal cases without violating the Constitution of the United States.

The provision of § 5 of Art. XV of the Maryland Constitution that "[i]n the trial of all criminal cases, the Jury shall be the Judges of Law"[4] has not been construed as all

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[2] Since the decision in *Slansky*; Indiana has modified by judicial interpretation the concept that a jury has an "exclusive" right to determine the law in criminal cases. See *Beavers* v. *State*, 141 N.E. 2d 118.

[3] See, for example, *Pierce* v. *State*, 13 N.H. 536; *State* v. *Burpee*, 65 Vt. 1; *Commonwealth* v. *Anthes*, 5 Gray (Mass.) 185.

[4] Rule 739 b, in effect when this case was tried, provided that the jury should be told that it was the *final* judge of the law in every case in which advisory instructions were given, but the word "final" was omitted from section b of the revised and renumbered Rule 756 that became effective January 1, 1962.

inclusive, and some limitations upon its scope have been recognized ever since its adoption. Thus, for instance, in *Franklin* v. *State*, 12 Md. 236 (1858), it was held that the jury had no right to pass upon the constitutionality of a statute and that it was proper for the trial court to prohibit counsel from arguing that question before the jury. Trial courts have always passed and still pass upon the admissibility of evidence the jury may consider on the issue of the innocence or guilt of the accused. *Vogel* v. *State*, 163 Md. 267, 162 Atl. 705 (1932); *Dick* v. *State*, 107 Md. 11, 68 Atl. 286 (1907) and 107 Md. 21, 68 Atl. 376 (1908); *Beard* v. *State*, 71 Md. 275, 17 Atl. 1044 (1889); *Bell* v. *State*, 57 Md. 108 (1881); *Wheeler* v. *State*, 42 Md. 563 (1875). Though it was not required to do so until recently, a trial court has always had the right to give an advisory instruction as to the law. See, among others, *Beard* v. *State*, *supra*, and the line of cases therein cited. In *Luery* v. *State*, 116 Md. 284, 81 Atl. 681 (1911), this Court went even further and recommended that a trial court should give instructions whenever requested or whenever the court considered it desirable even though not requested. Moreover, it is the duty of a jury to decide a case according to the established rules of law, and if it should misapply the law to the prejudice of the accused, the trial court has the power to set aside the verdict and grant a new trial. *Beard* v. *State*, *supra*. And, which is equally (if not more) important to the accused, an erroneous instruction, if it is reasonably objected to, is reviewable by this Court. See, for example, *Swann* v. *State*, 64 Md. 423, 1 Atl. 872 (1885). But what was said in *Vogel* v. *State*, *supra*, the principle of which is now incorporated in Maryland Rule 756 e (formerly Rule 739 e), with respect to the right of the trial court to defer giving instructions until the conclusion of the argument and thus preclude counsel from arguing to the contrary, undoubtedly did more to make the constitutional provision less effective than any prior decision of this Court. See the comment with respect

to the *Vogel* case by Prof. Mark DeW. Howe in *Juries as Judges of Criminal Law*, 52 Harv. L. Rev. 582, fn. 125, at p. 614. Additional safeguards were instituted in 1950 when the State Constitution (§ 5 of Art. XV) was so amended as to give this Court the power to review the sufficiency of the evidence to sustain a conviction when a question with respect thereto is properly reserved in the trial court. See *Shelton* v. *State*, 198 Md. 405, 84 A. 2d 76 (1951), and *Yanch* v. *State*, 201 Md. 296, 93 A. 2d 749 (1953). To implement the right of the trial court under the amendment to pass upon the sufficiency of the evidence in the lower court, a supplementary statute, now codified as § 593 of Art. 27 of the 1957 Code, was enacted, under which (and former Rule 738 now Rule 755) the trial court, at the request of the defendant, may direct a verdict in his favor[5] and the defendant is afforded the right of appeal should the trial court refuse the requested instruction. See *Auchincloss* v. *State*, 200 Md. 310, 89 A. 2d 605 (1952). And Rule 756 b (formerly Rule 739 b) makes it mandatory for the trial court to give an advisory instruction whenever it is requested. We think the existing procedure in this State for the trial of criminal cases, including as it does the provision by which the jury in such cases is the judge of the law as well as the facts, is not such as to deprive a defendant of adequate means of protecting his rights in a trial before a jury. Historically, the purpose of the constitutional provision was not to curtail the defendant's

[5] Rule 738, in effect when this case was tried, permitted a defendant to move for an instruction or for a directed verdict based on the insufficiency of the evidence, but the revised and renumbered Rule 755 that became effective January 1, 1962, provides that a motion for judgment of acquittal shall be used in the place of the motion for a directed verdict of not guilty and the motion for an instruction that the evidence is insufficient in law to sustain a conviction which has been abolished.

protection.[6] Furthermore, where full use is made of all presently available safeguards, it may be difficult, in practical operation, to distinguish between the *power* of a jury (under binding instructions) to render a verdict and the *right* of a jury (under advisory instructions) to determine the law for itself in reaching a verdict.

While it is true that in the *Slansky* case, we were primarily concerned with a claim that due process had been violated, we see no reason in this case, where the claim of unconstitutionality is also based on an alleged denial of equal protection, why the holding here should be different from the holding there. In the first place, we think it was implicit in *Slansky* that neither clause had been violated. But regardless of that, it seems clear in this case that the defendants were afforded that fundamental fairness which is required by the due process clause, and that they were not subjected to a trial different from that given to other defendants in like circumstances which is forbidden by the equal protection clause. For here—where the issue was principally one of fact and the weight of the evidence and credibility of the witnesses were also matters for the jury to determine—we find nothing in the record to indicate, even though no instructions as to the law were asked for or given, that the jury did not correctly apply the law to the facts in the performance of its constitutional duty.

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[6] The historical origin of the constitutional provision and the distinction between the power of the jury to apply the law to the facts in a criminal case and the right of a jury to determine the law as well as the facts has been discussed by the bench and bar of this State on many occasions during the last three decades. See, for example, Markell, *Trial by Jury—A Two-Horse Team or a One-Horse Team?*, 42 Md. St. Bar Ass'n. Rep. 78; Dennis, *Maryland's Antique Constitutional Thorn*, 92 Pa. L. Rev. 34; Henderson, *The Jury as Judges of Law and Fact in Maryland*, 52 Md. St. Bar Ass'n. Rep. 184; Prescott, *Juries as Judges of the Law: Should the Practice be Continued*, 60 Md. St. Bar Ass'n. Rep. 246. See also the debate on the subject in 39 Md. St. Bar Ass'n. Rep. 71, *et seq.*, and the note in 1 Md. L. Rev. 175.

(vi)

There is also a contention that the defendants were denied due process and equal protection of the law by the failure of the trial court to give an advisory instruction as to the law even though the defendants made no request therefor. This contention, like that in point (v), also lacks merit. The claim here is that even if a jury may determine what principles of law are to be applied in a criminal case, it may not in a capital case be left without any instruction as to the law. But the claim overlooks the fact that a defendant may waive his right to require an instruction in a capital case as he may in any other criminal case.

As noted herein, Rule 756 b makes it mandatory upon the trial court to advisorily instruct the jury as to the law at the request of either party. Section f of the rule further provides that a party may object to the failure to give any instruction or an inadequate one. But in this case neither the State nor the defendants requested an instruction or objected to the failure of the court to give one as to the law. The only statement made by the court to the jury at the close of the evidence—which was certainly not an instruction though it is designated that in the record—merely informed the jury that it could render any one of three verdicts.

Although there is nothing in the record to so indicate, it may be assumed that the State's attorney as well as the defendants, who were represented by an able and experienced attorney, deliberately chose not to request instructions or object to the failure to give them, in order to be in a position to argue the law of the case to the jury without prior or subsequent instructions by the court contrary to what they anticipated arguing or had already argued to the jury. Cf. *Schanker* v. *State*, 208 Md. 15, 116 A. 2d 363 (1955). But be that as it may, since there was no objection to the absence of an instruction, there is nothing before us to review. Rules 756 g and 885; *Lane* v. *State*, 226 Md.

81, 172 A. 2d 400 (1961), *cert. den.* 368 U.S. 993 (1962); *Reynolds* v. *State*, 219 Md. 319, 149 A. 2d 774 (1956); *Bulluck* v. *State*, 219 Md. 67, 148 A. 2d 433 (1959).

While Rule 756 g[1] permits this Court of its own motion to take cognizance of and correct any plain error material to the rights of the accused even though not included in the assignment of errors, we are unable to say that the failure to request an instruction or to object to the failure to give one under the circumstances in this case was such an error as this Court ought to take notice of. See *Martel* v. *State*, 221 Md. 294, 157 A. 2d 437 (1960), *cert. den.* 363 U.S. 849 (1960), where we had occasion to point out that whatever other meanings the term "plain error" might involve, it does not include appellate alleviation of such unfortunate consequences as may result from a choice of trial tactics. See also *Canter* v. *State*, 220 Md. 615, 155 A. 2d 498 (1959), and *Madison* v. *State*, 200 Md. 1, 87 A. 2d 593 (1952).

Furthermore, even if it is assumed that the defendants had a constitutional right to have the jury instructed as to the law, it is clear that in a case such as this, where they were represented by competent and experienced counsel, even constitutional rights may be waived by not asserting them. *Lenoir* v. *State*, 197 Md. 495, 80 A. 2d 3 (1951). See also *Heffner* v. *Warden*, 211 Md. 638, 126 A. 2d 304 (1956), *cert. den.* 353 U.S. 914 (1957), a *habeas corpus* proceeding, in which the same contention as that presented here was raised and rejected.

(vii)

The final contention that the sentence was excessive is likewise without substance. Since the penalty was one of those prescribed by the statute, it is not excessive, and there is no basis for a reversal for that reason. *Merchant* v. *State*, 217 Md. 61, 141 A. 2d 487 (1958).

JUDGMENTS AFFIRMED.

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[1] See also the provision of Code (1957), Art. 5, § 16.

APPENDIX B

Judgments of the Trial Court

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

(Before James H. Pugh, Judge)

No. 4590 Criminal

STATE OF MARYLAND

v.

JAMES V. GILES and JOHN G. GILES

December 11, 1961—Sentence of James V. Giles: It is the sentence of this Court that you, James V. Giles be taken into custody by the Sheriff of this County and held by him in solitary confinement; that under such guard or guards as he shall determine to be necessary and as soon hereafter as possible, the said Sheriff shall deliver you to the Warden of the Maryland Penitentiary, where you shall be placed in solitary confinement, under such guard or guards as shall be necessary, until such time as the warrant directing your execution shall name, when you shall suffer death by the administration of a lethal gas—and may God have mercy on your Soul.

December 11, 1961—Sentence of John G. Giles: It is the sentence of this Court that you, John G. Giles be taken into custody by the Sheriff of this County and held by him in solitary confinement; that under such guard or guards as he shall determine to be necessary and as soon hereafter as possible, the said Sheriff shall deliver you to the Warden of the Maryland Penitentiary, where you shall be placed in solitary confinement, under such guard or guards as shall be necessary, until such time as the warrant directing your execution shall name, when you shall suffer death by the administration of a lethal gas—and may God have mercy on your Soul.